64 FLRA No. 52

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3354
(Union)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
RURAL DEVELOPMENT
CENTRALIZED SERVICING CENTER
(Agency)

0-AR-4326

DECISION

December 24, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Richard L. Horn filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency did not file an opposition to the Union's exceptions.

The Arbitrator found that the Agency did not violate the parties' agreement when it changed the performance standards affecting bilingual telephone representatives. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated Articles 14 and 29 of the parties' agreement when the Agency changed the performance standards affecting bilingual telephone representatives. [1]

When the grievance was unresolved, it was submitted to arbitration, where the Arbitrator stated the issues as follows: [2]

> Did the Agency violate Article 14 and Article 29 of the Labor/Management Agreement, when it changed the Performance Standards of Bi-Lingual Telephone Representatives?
>
> Did the changes to the Bi-Lingual employees['] Performance Standards result in Disparate Treatment toward Bi-Lingual Telephone Representatives?

Award at 2.

The Arbitrator found that, as a result of the performance-standard changes, "Bi-Lingual and English-only Telephone Representatives working at the same Grade Level and the same Job Description have the same Performance Standards." *Id.* at 9. The Arbitrator also found that management has a statutory right to change performance standards. *See id.* (citing *NTEU v. FLRA*, 691 F.2d 553 (1982)).

1. Articles 14 and 29, in pertinent part, provide as follows:

> ARTICLE 14[:] POSITION DESCRIPTIONS AND PERFORMANCE APPRAISAL
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> . . . .
>
> § 1(D). Any duty or responsibility for which a performance standard has been established will be based on the requirements and expectations of the position and will be consistent with the current position description.
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> . . . .
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> ARTICLE 29[:] MULTI-LINGUAL EMPLOYEES
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> . . . .
>
> § 1(A)(3). The Employer will continue to consider multi-lingual Employees in the same manner as monolingual Employees when considering details, reassignments, leave approval and other conditions of employment. . . .
>
> § 2. The Parties recognize that the successful performance of multi-lingual duties often requires more time and effort and is more complex than performing similar work where only one language is used. Any additional effort required to successfully carry out multi-lingual duties will be considered by the Employer in arriving at a bargaining unit Employee's performance appraisal as long as the performance of multi-lingual duties are officially assigned to the position and routinely carried out by the Employee.

Exceptions, Attach. (Collective Bargaining Agreement (dated Feb. 7, 2000)) at unnumbered pp. 1-3.

2. It is unclear from the record whether the parties stipulated the issues.

In addition, the Arbitrator determined that Article 14, Section 3(D) of the agreement also permits the Agency to change performance standards.[3] *Id.* The Arbitrator determined that, although the agreement requires the Agency to follow certain procedures before doing so, "management complied with contractual procedures." *Id.* at 10. Specifically, he found that the Agency responded to a Union "request[] to bargain over the Impact and Implementation (I&I) of the proposed changes" by "schedul[ing] times for the Union to meet with the affected" employees and "consider[ing] the Union's input and incorporat[ing] several of [its] recommendations[.]" *Id.* The Arbitrator concluded that "[p]ursuant to the Contract language and the case law cited above, the Agency fulfilled its obligations." *Id.*

With respect to the Union's claim of disparate treatment, the Arbitrator found that the Agency's implemented performance standards are similar to standards adopted by the Federal Service Impasses Panel (FSIP) in *SEC*, 6 FSIP 54 (2006). In this regard, the Arbitrator found that both sets of standards require uniform performance standards for employees in the same positions at the same grade levels. The Arbitrator concluded that the implementation of the standards in the instant case did not result in disparate treatment under the parties' agreement. Award at 11.

Accordingly, the Arbitrator found that the Agency did not violate the agreement, and he denied the grievance. *Id.* at 13.

III. Union's Exceptions

As an initial matter, the Union challenges several statements contained in the section of the award that sets out the parties' positions. Specifically, the Union challenges statements that: (1) reference "Agency data based on ITS reports"; (2) describe "higher-graded employees" as those who "dealt with the more complex problems"; (3) contend that the Union believes the intent of a retention letter was violated; and (4) characterize the Agency's change in performance standards as "fair and equitable treatment to employees." Exceptions at 1-2. The Union also argues that the Arbitrator erred by finding that "the Agency considered the Union's input"[4] in bargaining over the impact and implementation of changes in performance standards and by finding that the positions of bilingual and monolingual employees are the same. *Id.* at 2-3.

In addition, the Union maintains that the Arbitrator demonstrated bias by finding no contract violation and by rendering an award against the Union. *See id.* at 1, 3. The Union also claims that the Arbitrator made an inappropriate remark about the feelings of his "Mexican friend" during the arbitration and that the Union did not object at the hearing because it feared unfavorable treatment from the Arbitrator. *Id.* at 3.

The Union also excepts to the numerous typographical errors in the award and asserts that the "Arbitrator must have been in a rush" when resolving the grievance. *Id.* at 2. Additionally, the Union argues that the Arbitrator misinterpreted Articles 14 and 29 by declining to address seven issues that the Union raised to support its claim that the Agency violated those articles. Specifically, the Union argues that the Arbitrator failed to consider issues regarding: (1) discriminatory distribution of performance awards; (2) negative effects of the changed performance standards on employee morale; (3) an increase in the number of opportunity-to-improve letters issued to bilingual representatives; (4) decreasing accuracy and quality in bilingual call services since performance standards were changed; (5) additional Spanish adjectives and adverbs that increase the amount of time that bilingual representatives must spend handling calls; (6) considerations granted to monolingual employees but not to bilingual employees; and (7) denials of promotions. *Id.* at 3.

Finally, the Union asserts that "case law supports the Union," after which it cites several decisions without explanation. *Id.* at 3-5 (citing *HHS, SSA, Balt., Md. and Nat'l Council of SSA Field Operations Locals, AFGE*, 90 FSIP 197 (1991) (*HHS, SSA*); *SSA and AFGE*, 30 FLRA 1156 (1988); *Dep't of the Treasury, IRS v. FLRA*, 494 U.S. 922 (1990) (*IRS v. FLRA*); *Dep't of the*

3. Article 14, § 3(D), as quoted by the Arbitrator, states:

> When a new Performance plan is developed or an existing plan is changed, it will be communicated to affected employees and to the Union not less than fifteen (15) days prior to implementation…. Employees covered by the new revised Performance plan will be provided the opportunity to meet with their Union representative to discuss the changes and develop input regarding the new revised plan…. The employees Union can provide the input developed as a result of the meeting to the Supervisor either in face-to-face discussions or in writing.

Award at 2, 9-10.

4. Article 14, § 3(C), as quoted in the award and invoked by the Union to support this exception, states:

> Employees may provide input to the supervisor on their performance plan at any time. When [e]mployee(s) propose changes to their performance plan because significant changes have occurred in work assignments during the rating year, the supervisor will respond to the [e]mployee(s)' proposals within 30 days of receipt.

Award at 2.

Treasury, Bureau of Engraving & Printing, 53 FLRA 146 (1997) (*BEP*)).

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

As noted above, the Union excepts to several statements from the section of the award that sets out the parties' own positions. Exceptions at 1-3. In addition, the Union argues that the Arbitrator erred by finding that the Agency properly considered the Union's input, [5] and by finding that the positions of monolingual and bilingual employees are the same. *Id.* at 2-3. We construe these arguments as claims that the award is based on nonfacts.

To demonstrate that an award is based on a nonfact, the appealing party must establish that the central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry AFB*). However, the Authority will not find an award deficient on the basis of any factual matter that the parties disputed at arbitration. *Id.* at 594 (citing *Nat'l Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985)).

With respect to the Union's exceptions to the Arbitrator's statements describing the positions of the parties, the statements are not factual findings underlying the award. Thus, the exceptions do not demonstrate that the award is based on nonfacts. With regard to the Union's exception that the Arbitrator erred by finding that the Union's input was properly considered during impact and implementation bargaining, the Union provides no basis for concluding that this finding is clearly erroneous. *See Lowry AFB*, 48 FLRA at 593. Thus, the Union does not establish that the award is based upon a nonfact in this regard.

As for the Union's argument that bilingual employees do not hold the same positions as monolingual employees, the parties disputed this issue at arbitration. *See* Award at 11. Accordingly, this argument provides no basis for finding that the award is based on a nonfact. *See Lowry AFB*, 48 FLRA at 593.

For the foregoing reasons, we deny the nonfact exceptions.

5. For support, the Union cites Article 14, § 3(C), the wording of which is set forth *supra* note 4.

B. The Arbitrator was not biased.

The Union argues that the Arbitrator was biased. Exceptions at 1, 3. To establish that an award is deficient because of bias on the part of the arbitrator, a party must show that an award was procured by improper means, that the arbitrator was partial or corrupt, or that the arbitrator engaged in misconduct that prejudiced the parties' rights. *See NAGE, Local R1-109*, 58 FLRA 501, 504 (2003) (citing *U.S. Dep't of Veterans Affairs, Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 398 (1996)). In addition, a party's assertion that all of an arbitrator's findings were adverse to that party, without more, does not demonstrate that an arbitrator was biased. *See, e.g., U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 56 FLRA 381, 384 (2000) (*RHJ Med. Ctr.*). Finally, issues involving arbitrator conduct at the hearing should be raised at the hearing. When they could have been, but were not raised before the arbitrator, such issues will not be considered for the first time on review of an award unless exceptional circumstances are present. *See U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 57 FLRA 417, 422 (2001) (*Indian Head*).

Although the Union contends that the Arbitrator's failure to find the Agency in violation of the agreement is an indication of bias, the Union does not allege that the Agency procured the award by improper means. Moreover, the Union's dispute with arbitral findings in favor of the Agency does not, by itself, demonstrate that the Arbitrator was "partial or corrupt, or that the arbitrator engaged in misconduct that prejudiced the parties' rights." *See RHJ Med. Ctr.*, 56 FLRA at 384.

As to the Arbitrator's alleged reference to the feelings of his "Mexican friend" during arbitration, even assuming that the Union's assertion is accurate, the Union admits that it did not raise before the Arbitrator any issues involving the alleged reference. *See* Exceptions at 3. Although the Union asserts that it feared an adverse response from the Arbitrator, we find that such unsubstantiated fears do not constitute exceptional circumstances that would excuse the Union's failure to address this matter before the Arbitrator. We therefore decline to consider the Union's exception to these alleged remarks. *See Indian Head*, 57 FLRA at 422.

Accordingly, we deny the bias exceptions.

C. The Arbitrator conducted a fair hearing.

We construe the Union's criticism of the Arbitrator's typographical errors and its argument that the

"Arbitrator must have been in a rush" when resolving the grievance, as exceptions that the Arbitrator denied the Union a fair hearing. Exceptions at 3, 2. The Authority will find an award deficient on the ground that an arbitrator failed to conduct a fair hearing when a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *See GSA, Region 9, L.A., Cal.*, 56 FLRA 978, 979 (2000) (citing *AFGE, Local 1668*, 50 FLRA 124, 126 (1995)) (*GSA*).

Neither the Union's criticism of the Arbitrator's typographical errors nor its conclusory assertion that the Arbitrator rushed in deciding the grievance demonstrates that the Arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced the Union as to affect the fairness of the proceeding as a whole. *See GSA*, 56 FLRA at 979. Accordingly, the exceptions do not demonstrate that the Arbitrator denied the Union a fair hearing, and we deny the fair-hearing exceptions.

D. The award draws its essence from the agreement.

We alternatively construe the Union's aforementioned claim that "the Arbitrator show[ed] his bias" by finding that the Agency did not violate Articles 14 and 29 of the parties' agreement as a claim that the award fails to draw its essence from the agreement. *See* Exceptions at 3. We also alternatively construe the Union's aforementioned claim that the Arbitrator misinterpreted Article 14, Section 3(C) by finding that the Agency considered Union input [6] as an essence exception. Finally, we construe the Union's full quotation of agreement Article 29, Section 2 as an essence exception.

To establish that the award is deficient because it fails to draw its essence from the collective bargaining agreement, the Union must show that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See AFGE, Council 220*, 54 FLRA 156, 159 (1998) (citing *U.S. Dep't of Labor, OSHA*, 34 FLRA 573, 575 (1990)). The Authority defers to an arbitrator's interpretation of the collective bargaining agreement "because it is the arbitrator's construction of the agreement for which the parties have bargained." 34 FLRA at 576; *cf. Paperworkers v. Misco*, 484 U.S. 29, 38 (1987) (as long as an arbitrator is even arguably construing the collective bargaining agreement, a court will not find the award deficient). Furthermore, when a party fails to provide any arguments or authority to support an exception, the Authority will deny the exception as a bare assertion. *See U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004) (Chairman Cabaniss concurring) (*CBP*). Finally, a party's disagreement with an arbitrator's factual findings in the course of applying an agreement at arbitration does not demonstrate that an award fails to draw its essence from the agreement. *See AFGE, Local 12*, 61 FLRA 507, 509 (2006).

The Union's unsupported statement that the Arbitrator showed his bias by failing to find a violation of Articles 14 and 29 is a bare assertion. The Union's quotation of Article 29, Section 2 of the agreement, with no supporting analysis, is also a bare assertion. As such, these arguments provide no basis for finding the award deficient. *See CBP*, 60 FLRA at 492 n.7.

As for the Union's exception to the arbitral construction of Article 14, Section 3(C), the Union's only support for this exception is a restatement of its disagreement with the Arbitrator's factual finding that the Agency properly received and considered unit employees' input. Exceptions at 2-3. However, as previously mentioned, a disagreement with an arbitrator's factual finding does not provide a basis for concluding that an award fails to draw its essence from an agreement. *See AFGE, Local 12*, 61 FLRA at 509.

For the foregoing reasons, the Union's exceptions do not demonstrate that the award fails to draw its essence from the agreement. Accordingly, we deny the essence exceptions.

E. The Arbitrator did not exceed his authority.

We construe the Union's assertion that the Arbitrator failed to address several issues as an exception that the Arbitrator exceeded his authority. As relevant here, arbitrators exceed their authority by failing to resolve an issue submitted to arbitration. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). However, when an Arbitrator's formulation of an issue is reasonable and the award is directly responsive to the formulated issue, the Authority denies exceptions contending that arbitrators exceeded their authority by failing to resolve an issue. *E.g., AFGE, Local 3134*, 56 FLRA 1055, 1056 (2001). Finally, when the Authority denies an essence excep-

6. *See supra* Part IV(A).

tion, and an exceeded-authority exception reiterates the same arguments as the essence exception, the Authority denies the exceeded-authority exception. *E.g.*, *NTEU*, 62 FLRA 45, 48 (2007).

The Union's essence exceptions assert that the Arbitrator misinterpreted Articles 14 and 29 of the parties' agreement. In its exceeded-authority exception, the Union argues that the Arbitrator failed to consider seven issues raised at arbitration because the Arbitrator misinterpreted the scope of Articles 14 and 29 of the agreement. Exceptions at 3. However, the Arbitrator's award directly responded to the formulation of issues in his decision, and the Union has not demonstrated that the formulation is unreasonable. *See AFGE, Local 3134*, 56 FLRA at 1056. Moreover, the exceeded-authority exception is based on the same premise as the essence exceptions, and therefore it does not articulate a sufficient, independent basis for finding the award deficient. *See NTEU*, 62 FLRA at 48.

Consistent with our denial of the essence exceptions addressing Articles 14 and 29 of the agreement, we deny the exceeded-authority exceptions addressing those same provisions.

F. The award is not contrary to law.

The Union's final exception consists of several citations to previous FSIP and Authority decisions. Exceptions at 3-5. We construe this exception as an argument that the award is contrary to law. The Authority's role in reviewing arbitration awards depends on the nature of the exceptions raised by the appealing party. *See U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686 (D.C. Cir. 1994). In *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995), the Authority stated that if the arbitrator's decision is challenged, as it is here, on the ground that it is contrary to any law, rule, or regulation, the Authority will review the legal question *de novo*. In applying a standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.* Finally, an excepting party's mere citation to Authority precedent, without explanation or analysis, is nothing more than a bare assertion and does not demonstrate that an arbitrator's award is contrary to law. *See, e.g.*, *AFGE, Local 3979*, 61 FLRA 810, 814 (2006).

The Union's first citation is to an FSIP decision, *HHS, SSA*, 90 FSIP 197, which involved a dispute between the Social Security Administration and its employees' bargaining representatives. The second citation, *SSA and AFGE*, 30 FLRA 1156, and a lengthy accompanying excerpt and summary, refer to a standard for reviewing exceptions to arbitral modifications of performance appraisals. The third citation, *IRS v. FLRA*, 494 U.S. 922, refers to a decision in which the Supreme Court determined that the Authority should not employ the standard of review that had been articulated in the Union's second cited decision, *SSA and AFGE*, 30 FLRA 1156. Finally, the fourth citation, *BEP*, 53 FLRA 146, sets forth the legal analysis that the Authority applies in resolving management rights exceptions to arbitration awards. *See id.* at 151-56.

The Union's citation to an FSIP decision concerning different parties under a different contract does not demonstrate that the Arbitrator's award in this case is contrary to law. Moreover, the Union's other citations constitute nothing more than a list of decisions, without any explanation as to how the cited decisions apply to the facts of this case. In addition, to the extent that the Union's citation of *BEP* could be construed as an argument that the Arbitrator should have found Articles 14 and 29 to be exceptions to management rights, the Union provides no support for this argument.

Therefore, the Union's citation to a list of decisions is a bare assertion that does not provide a basis for finding the award contrary to any law, rule, or regulation. *See AFGE, Local 3979*, 61 FLRA at 814. Consequently, we deny the contrary-to-law exception.

V. Decision

The Union's exceptions are denied.